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Appealability of Refusals to Approve Proposed Title VII Consent Decrees: Carson v. American Brands, Inc.

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Appealability of Refusals to Approve Proposed Title VII Consent Decrees: *Carson v. American Brands, Inc.*

Frank L. Carson brought a title VII[1] class action against his employer and his union, alleging denial of equal job opportunities on the basis of race.[2] After lengthy discovery[3] and class certification,[4] all counsel negotiated a mutually satisfactory consent decree[5] and tendered it for judicial approval.[6] The district court refused to approve the decree on the premise that it granted preferential treatment on the basis of race in violation

1. Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. II 1978). The named plaintiff requested relief "on behalf of black employees and black persons who sought employment at [defendant's] Richmond, Virginia, leaf department." Carson v. American Brands, Inc., 606 F.2d 420, 425 (4th Cir. 1979) (Winter, J., dissenting).

2. As well as allegedly violating title VII, the contested practices allegedly violated section 1981 of the Civil Rights Act, 42 U.S.C. § 1981 (1976), and the fourteenth amendment to the United States Constitution. *See* Brief for Appellants at 2, Carson v. American Brands, Inc., 606 F.2d 420 (4th Cir. 1979).

3. Discovery in the case, which lasted for over one year, "included the taking of nineteen depositions and the analysis of boxes of written material tendered in response to some of the six sets of interrogatories." 606 F.2d at 425 (Winter, J., dissenting).

4. Pursuant to rule 23(b)(2) of the Federal Rules of Civil Procedure, the district court certified a class on March 1, 1977, that included all persons who had applied for employment, or who had actually been employed, as seasonal workers at American Brands on or after September 9, 1972. 606 F.2d at 425-26 (Winter, J., dissenting).

5. The five substantive provisions of the proposed consent decree are found in the dissenting opinion. These provisions allow: (1) seniority credit for seasonal employment; (2) elimination of an extra probationary period "to become eligible for medical and sick benefits" for "[r]egular employees who [h]ad successfully served a probationary period as seasonal employees;" (3) an opportunity for seasonal employees to bid for regular production jobs before outside hiring; (4) an opportunity for seasonal employees "to bid on vacancies in the watchman job classification" before outside hiring; and (5) a goal of making the supervisory force one-third black by December 31, 1980. 606 F.2d at 427 (Winter, J., dissenting).

6. All class action consent decrees must be tendered for judicial approval. FED. R. CIV. P. 23(e). The rule is designed both to minimize the possibility of strike suits and to ensure that the interests of absent class members are adequately protected. *See* Norman v. McKee, 431 F.2d 769, 774 (9th Cir.), *cert. denied*, 401 U.S. 912 (1970); Yaffe v. Detroit Steel Corp., 50 F.R.D. 481, 483 (N.D. Ill. 1970). *See also* 3b MOORE'S FEDERAL PRACTICE ¶ 23.80 [2.-1] (2d ed. 1979); 3 H. NEWBERG, NEWBERG ON CLASS ACTIONS 402-03 (1977); Dole, *The Settlement of Class Actions For Damages*, 71 COLUM. L. REV. 971, 975 (1971).

of title VII.[7] The Court of Appeals for the Fourth Circuit refused to review this determination, *holding* that a district court order refusing entry of a proposed title VII class action consent decree is not appealable. *Carson v. American Brands, Inc.*, 606 F.2d 240 (4th Cir. 1979).

The appealability of district court orders is circumscribed by section 1291 of the Judicial Code, which states: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts . . . ."[8] The main rationale for restricting appeals to "final" orders[9] is the enhancement of judicial efficiency[10] through avoidance of time-consuming piecemeal appeals[11] and through consolidation of potential errors.[12] Various factors, however, militate against rigid adher-

7. Carson v. American Brands, Inc., 446 F. Supp. 780, 790-91 (E.D. Va. 1977), *appeal dismissed*, 606 F.2d 420 (4th Cir. 1979). *See* Reply Brief for Appellants at 5, Carson v. American Brands, Inc., 606 F.2d 420 (4th Cir. 1979).

8. 28 U.S.C. § 1291 (1976).

9. Traditionally, a final order is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). The line of demarcation between appealability and finality, however, is by no means clear. As early as 1892 the court observed: "Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. . . . The cases, it must be conceded, are not altogether harmonious." McGourkey v. Toledo & O. Cent. Ry., 146 U.S. 536, 544-45 (1892). Recently, the Court reiterated this point: "No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974) (citing McGourkey v. Toledo & O. Cent. Ry., 146 U.S. 536, 544-45 (1892)). *See also* Dickenson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

10. Coopers & Lybrand v. Livesay, 437 U.S. 463, 473 (1978); Catlin v. United States, 324 U.S. 229, 234 (1945). For a more detailed discussion of the justifications for the rule, see generally C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3907, at 429-35 (1976); Note, *Interlocutory Appeal Under 28 U.S.C. § 1292(a)(1) of Orders Denying Class Action Certification*, 58 B.U.L. REV. 61, 62 (1978) [hereinafter cited as Boston Note]; Note, *Toward A More Rational Final Judgment Rule: A Proposal to Amend 28 U.S.C. § 1292*, 67 GEO. L.J 1025, 1025-26 (1979) [hereinafter cited as Georgetown Note]; Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 351-52 (1961) [hereinafter cited as Harvard Note].

11. *See, e.g.*, Coopers & Lybrand v. Livesay, 437 U.S. 463, 471 (1978). Apart from an annoying trial interruption, a lengthy delay may require the trial court to spend additional time refamiliarizing itself with the case and conceivably may require the trial to start new. *See* Harvard Note, *supra* note 10, at 351-52.

12. Not only will all of the relevant errors be consolidated, but many alleged errors will no longer be significant. For example, the parties may settle, the party prejudiced by the error may emerge victorious, or the trial judge may reverse his decision. C. WRIGHT, A. MILLER & E. COOPER, *supra* note 10, § 3907, at 431.

Other arguments in support of a narrow appealability rule include: the danger that a wealthy party could harass another litigant through repeated interlocutory appeals of subsidiary issues, *see* Cobbledick v. United States, 309 U.S. 323, 325 (1940); C. WRIGHT, A. MILLER & E. COOPER, *supra* note 10, § 3907, at

ence to a strict finality rule.[13] Unless some interlocutory orders are immediately appealable, litigants may undergo irreparable harm[14] or may be compelled to conduct an unnecessary and expensive trial.[15] The finality rule would actually cause judicial inefficiency if the savings in appellate resources from refusals to review are outweighed by the waste of trial court resources in continuing to a final decision.[16] Recognition of these countervailing considerations has resulted in both statutory and judicial exceptions to the section 1291 "finality" rule.[17]

One such judicial exception was set forth in *Cohen v. Bene-*

432; the possible diminished respect for a trial judge's decisions if a barrage of appeals takes place, *see* Georgetown Note, *supra* note 10, at 1025 n.7; Harvard Note, *supra* note 10, at 352; the likelihood that ready availability of immediate appeal from a trial judge's decisions will reduce his ability to control the litigation, *see* Carson v. American Brands, Inc., 606 F.2d at 424-25; and finally, the belief that appellate court decisions are made more accurate by reviewing alleged errors with a complete record, *see id.* at 422.

13. *See generally* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 10, § 3907, at 433; Boston Note, *supra* note 10, at 62-63; Georgetown Note, *supra* note 10, at 1026 n.16; Harvard Note, *supra* note 10, at 353.

14. This is readily apparent in a request for a preliminary injunction on the ground of pending irreparable harm. A strict application of the final judgment rule would postpone appeal of a denial of a preliminary injunction until after a determination on the permanent injunction. If the former derermination was in error, it would be impossible to mitigate the harm. *See* Boston Note, *supra* note 10, at 62.

15. A reversal of an interlocutory order may dispose of the litigation and obviate the need for futher lower court proceedings. *See* Harvard Note, *supra* note 10, at 352.

16. The Supreme Court recognized this in Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), when it said: "[N]ow that the case is before is before us . . . the eventual costs, . . . will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided. Moreover, delay of perhaps a number of years . . . might work a great injustice. . . ." *Id.* at 153. This consideration should only be applied when the savings in resources are substantial. The Supreme Court recently refused to apply *Gillespie* in Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), in which it stated, "If *Gillespie* were extended beyond the unique facts of that case, § 1291 would be stripped of all significance." *Id.* at 477 n.30.

17. Only the "collateral" order exception to section 1291, *see* notes 18-20 *infra* and accompanying text, and the statutory exception of section 1292(a)(1), *see* notes 23-28 *infra* and accompanying text, are relevant to the appealability of a refusal to enter a consent decree. Other exceptions relevant to some interlocutory orders but beyond the scope of this Comment include: rule 54(b) of the Federal Rules of Civil Procedure, allowing final judgments to be entered with respect to less than all of the claims or parties; the *Forgay-Conrad* exception, involving orders to deliver property; the "death knell" doctrine, allowing case certification appeal if it is likely that the individual plaintiff cannot pursue the lawsuit, which was rejected by the Supreme Court in Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 (1978); section 1292(b) of the Judicial Code, 28 U.S.C. § 1292(b) (1976), allowing certification of appeals of substantial issues of law; and the All Writs Act, 28 U.S.C. § 1651(a) (1976), authorizing writ of mandamus.

ficial Industrial Loan Corp.,[18] in which the Court held that "collateral orders" may be appealed even though they are not technically "final decisions."[19] The exception requires that the order (1) not be tentative, informal, or incomplete; (2) be collateral to and separate from the merits; and (3) be effectively unreviewable—the asserted right will be "lost, probably irreparably" if review is delayed.[20] Many of these original criteria have been inconsistently applied as lower courts have expanded the *Cohen* exception.[21] Despite this occasionally inconsistent application, the Court reaffirmed the validity of those criteria in a recent decision, *Coopers & Lybrand v. Livesay*.[22]

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18. 337 U.S. 541 (1949).

19. The Court held that an order requiring the stockholder-plaintiff to comply with a state statute that compelled the posting of bond was appealable pursuant to section 1291.

> This decision appears to fall in that small class which finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.

Id. at 546.

20. *Id.* Some commentators derive a fourth requirement from the *Cohen* opinion—the order must involve a serious and unsettled question of public importance. *See* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 10, § 3911, at 470-71; Note, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 24 U. CHI. L. REV. 450, 454-55 (1978); Case Comment, *Immediate Appealability of Orders Denying Class Certification:* Coopers & Lybrand v. Livesay *and* Gardner v. Westinghouse Broadcasting Co., 40 OHIO ST. L.J. 441, 452 (1979). This fourth requirement has always been arguable, at best, and recently was discarded by the Court. *See* United States v. MacDonald, 435 U.S. 850, 855 (1978); Abney v. United States, 431 U.S. 651, 658 (1977).

21. *See* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 10, § 3911, at 472-86; Case Comment, *supra* note 20, at 450-51.

22. 437 U.S. 463 (1978). *See* Recent Developments, *Appealability of District Court Orders Disapproving Proposed Settlements in Shareholder Derivative Suits*, 32 VAND. L. REV. 985, 991 (1979). The Court stated that "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." 437 U.S. at 468. One commentator argued that Justice Stevens enunciated a conjunctive test (by using "and") and used "completely separate" to imply a stricter threshold. The commentator concluded that the test had been "reformulated." *See* Recent Developments, *supra*, at 991.

It is clear, however, that the test has always been conjunctive—all three requirements must be met. All pretrial orders in response to motions "conclusively determine the disputed question" and would be appealable if the test were disjunctive. Moreover, Justice Stevens' use of "completely separate" to refer to a collateral order is by no means dispositive. Not only does he cite the original *Cohen* language in the accompanying footnote, *see* Coopers & Lybrand v. Livesay, 437 U.S. at 468 n.10 (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)), he also borrows the language of Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963), which simply states that an order cannot be "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 558. *See* Coopers & Lybrand v. Livesay, 437 U.S. at 469.

In addition to *Cohen*, section 1292(a)(1) also provides an exception to the section 1291 finality rule, by authorizing courts of appeal to review "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions."[23] Although it is clear that not all orders labeled "injunctions" are automatically appealable,[24] it is unclear whether the order must actually include words of restraint or direction to be appealable under section 1292(a)(1).[25] One widespread interpretation is that the language applies to orders that have the *substantial effect* of a "grant or refusal of an injunction."[26] This pragmatic test, often interpreted inconsistently,[27] is best applied by weighing the major policy considerations behind the finality rule and the "injunction" exception[28]—especially the possibility that irreparable harm may occur if appeal is not available.

In recent years, title VII class action suits have proliferated.[29] Nevertheless, until *Carson*, there were no reported cases discussing the appealability of a refusal to approve a proposed title VII consent decree. Some guidance, however, can

23. 28 U.S.C. § 1292(a)(1) (1976).

24. *See, e.g.*, International Prod. Corp. v. Koons, 325 F.2d 403, 406 (2d Cir. 1963) ("[T]he mere presence of words of restraint or direction in an order that is only a step in an action does not make § 1292(a)(1) applicable.") (citations omitted). *See also* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 10, § 2962, at 614.

25. *See* Note, *The Finality and Appealability of Interlocutory Orders—A Structural Reform Toward Redefinition*, 7 SUFFOLK U.L. REV. 1037, 1052 (1973).

26. In Ettleson v. Metropolitan Life Ins. Co., 317 U.S. 188 (1942), the Court stated: "The relief afforded by section 129 [the predecessor of section 1292(a)(1)] is not restricted by the terminology used. The statute looks to the substantial effect of the order made." *Id.* at 192 (citations omitted). *See also* Jordon v. School Dist., 548 F.2d 117, 119 n.5 (3d Cir. 1977); C. WRIGHT, A. MILLER & E. COOPER, *supra* note 10, § 2962, at 615.

27. This test caused one commentator to observe that "ingenious counsel have found injunctions lurking in virtually every ruling that a district court can be called upon to make." 9 MOORE'S FEDERAL PRACTICE ¶ 110.20[1], at 233 (2d ed. 1980). Such attorney tenacity and resultant judicial inconsistency renders it difficult to reconcile the case law. *See* Note, *supra* note 25, at 1051-52 n.70.

28. *See* notes 9-19 *supra* and accompanying text. *See also* notes 87-98 *infra*.

29. A trend in recent Supreme Court decisions, however, may eventually reduce the popularity of class action title VII suits. *See, e.g.*, Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978) (denial of class certification not appealable); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (denial of disability insurance for pregnancy not sex discrimination); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (individual notice to class members required if possible with reasonable effort); Zahn v. International Paper Co., 414 U.S. 291 (1973) (each class member must satisfy jurisdictional amount independently). *See generally* Boston Note, *supra* note 10, at 73-79.

be gleaned from the cases discussing the appealability of trial court refusals to approve settlements in shareholder derivative suits.[30] These cases have reached inconsistent results. The Ninth Circuit, for example, in *Norman v. McKee*[31] held an order denying approval of a proposed shareholder derivative settlement to be appealable under the collateral order doctrine. The court concluded that the order was not tentative and was collateral and independent from the merits because it was not a step toward final disposition and it did not merge in the final judg-

30. Prior to 1966, approval of both class action settlements and derivative suits were governed by the same provision—rule 23(c) of the Federal Rules of Civil Procedure. *See* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 10, § 1811, at 300. In 1966, however, the statute was amended so that class action settlements were governed by rule 23(e), and derivative suits were governed by rule 231. The rationale for this change was that, although most derivative actions qualified as class actions, the number of shareholders in some derivative suits was insufficient to justify a class action. Consequently, it was decided that shareholder derivative suits should be dealt with in a separate rule. *Id.* The amendment thus did not alter the underlying rationale for requiring judicial approval, *see* note 6 *supra*, and the standards used to evaluate proposed derivative and class action settlements are to some extent interchangeable. *See* Shensky v. Dorsey, 574 F.2d 131, 147 (3d Cir. 1978). *Compare In re* Pittsburgh and L.E. R.R. Securities & Antitrust Litigation, 543 F.2d 1058, 1070 (3d Cir. 1976) *with* Girsh v. Jepson, 521 F.2d 153, 156-57 (3d Cir. 1975). *See also* 3 H. NEWBURG, *supra* note 6, at 402; C. WRIGHT, A. MILLER & E. COOPER, *supra* note 10, § 1839, at 427.

The degrees of scrutiny applicable to proposed class or shareholder derivative settlements, however, are significantly different. Although a strong congressional policy encourages class action settlements and, to an even greater degree, title VII settlements, no such policy is present in shareholder disputes. Judicial review of refusals to approve proposed settlements should therefore be more readily available in title VII class actions. *See* notes 97-98 *infra* and accompanying text. Moreover, since title VII consent decrees include prospective relief, and shareholder derivative suits merely seek conpensatory relief, the policy considerations affecting appealability are substantially different. *See* notes 63-64 *infra* and accompanying text.

31. 431 F.2d 769, 774 (9th Cir.), *cert. denied*, 401 U.S. 912 (1970). Other federal courts have supported the *Norman* result without proffering rationales. For example, in *In re* International House of Pancakes Franchise Litigation, 487 F.2d 303 (8th Cir. 1973), the Eighth Circuit reviewed, without questioning its authority to do so, a refusal to approve a proposed settlement agreement. *But see* Roach v. Churchman, 457 F.2d 1101 (8th Cir. 1972). Typically, these other federal courts enunciate a standard of review applicable to "approval *or disapproval*" of proposed settlements. *See* United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co., 447 F.2d 647, 655 (7th Cir. 1971) (emphasis added). *See also* Young v. Katz, 447 F.2d 431, 433 (5th Cir. 1971).

A recent Pennsylvania case concurred with the *Norman* result. *See* Buchanan v. Century Fed. Sav. & Loan Ass'n, 393 A.2d 704 (Pa. Super. Ct. 1978) (class action of mortgage borrowers against lending institutions). The court, acknowledging that it was not compelled to follow federal precedent, explicitly stated that it would follow the *Norman* rule because it found it persuasive. *Id.* at 709 n.13.

ment.[32] Mootness would preclude review of the order following judgment.[33] Even assuming that the decision was reviewable at that time, courts following the Ninth Circuit approach note that it would be virtually impossible to frame a remedy for an abuse of discretion because the uncertainty that was present at the time of a compromise is gone.[34]

An alternate rationale used by these courts is that the savings in trial court resources resulting from immediate review outweigh the expenditure of appellate resources.[35] The *Norman* court noted that "stockholder's derivative suits *and class actions* generally present complex questions" that engender lengthy and expensive trials.[36] Consequently, erroneous refusals to approve settlements in such cases would waste trial court and litigant resources to a much greater extent than usual. The court added that this could infringe on the class members' right to fair representation.[37]

Other courts have reached opposite results, holding that refusals to approve settlements are not appealable.[38] The orders were not thought to be "collateral" because they were based, in part, on an assessment of the merits of the parties' positions, and were not a deviation from the main path of litigation; indeed, they were a step on the path leading to final judgment.[39]

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32. 431 F.2d at 773. *Accord*, Buchanan v. Century Fed. Sav. & Loan Ass'n, 393 A.2d 704, 707 (Pa. Super. Ct. 1978).

33. Buchanan v. Century Fed. Sav. & Loan Ass'n, 393 A.2d 704, 707 (Pa. Super. Ct. 1978).

34. *Id.* The fairness balancing test used to review the proposed settlement is predicated on the existence of incomplete facts. *See generally* Norman v. McKee, 431 F.2d at 773-74. It is impossible, in an after-the-fact review with full knowledge of what happened at trial, to feign a state of mind of incomplete knowledge.

35. *See, e.g.*, Norman v. McKee, 431 F.2d at 773 (relying on the standard of Gillespie v. United States Steel Corp., 379 U.S. 148 (1964)) *cert. denied*, 401 U.S. 912 (1970). *See also* note 16 *supra* and accompanying text.

36. Norman v. McKee, 431 F.2d 769, 774 (9th Cir.) (emphasis added), *cert. denied*, 401 U.S. 912 (1970).

37. *Id.*

38. Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978) (stockholder derivative settlement); Roach v. Churchman, 457 F.2d 1101 (8th Cir. 1972) (airplane accident class action settlement agreement).

In United States v. American Inst. of Real Estate Appraisers of the Nat'l Ass'n of Realtors, 590 F.2d 242 (7th Cir. 1978), the Seventh Circuit held that an order *approving* a proposed settlement was not appealable. *Id.* at 245. The opinion in *Appraisers* may be distinguished from *Seigal* and *Roach* on the basis of the unique procedural posture. The parties seeking review in *Appraisers* were permissive interveners challenging the approval of the proposed settlement. Arguably, this restricted intervention altered the policy considerations.

39. Seigal v. Merrick, 590 F.2d 35, 37-38 (2d Cir. 1978). (The order simply permitted "the parties to proceed with the litigation or to propose a different settlement." *Id.* at 37.) In Roach v. Churchman, 457 F.2d 1101 (8th Cir. 1972),

Since an approval of a compromise becomes a final judgment, a refusal to approve is arguably equivalent to the denial of summary judgment[40]—an order that is clearly not appealable.[41] Moreover, several courts have argued that the decree can still be reviewed following a trial on the merits.[42] One of these courts has also rejected section 1292(a)(1) as a basis for appeal, finding that a refusal to approve a settlement has neither the form nor effect of an injunction.[43]

In *Carson v. American Brands, Inc.*,[44] the Fourth Circuit held that a district court order refusing entry of a proposed title VII class action consent decree is not appealable. The court reasoned that although a district court's entry of a consent decree would terminate the action and would therefore be final, a refusal to enter a decree is only interlocutory.[45] The court focused solely on the inapplicability of the statutory exception to section 1291—section 1292(a)(1).[46] While conceding that the consent decree contained injunctive relief,[47] the court concentrated on the element of "irreparable harm."[48] No "irreparable"

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the court, without mentioning *Norman*, found that the order was not "collateral" because it "directly relates to the conduct of the defense in the main action. The granting of appellant's motion for a consent judgment would have resulted in a final disposition of the main action, not a disposition of a right 'separable' from the merits." *Id.* at 1104. Although the Seventh Circuit held nonappealable an order approving a proposed settlement, the court nevertheless conceded that the order was unrelated to the merits. United States v. American Inst. of Real Estate Appraisers of the Nat'l Ass'n of Realtors, 590 F.2d 242, 245 (7th Cir. 1978).

40. Seigal v. Merrick, 590 F.2d 35, 38 (2d Cir. 1978).

41. *See* Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc., 385 U.S. 23, 25 (1966). *See also* text accompanying notes 71-74 *infra*.

42. Roach v. Churchman, 457 F.2d 1101, 1104 (8th Cir. 1972). *Cf.* United States v. American Inst. of Real Estate Appraisers of the Nat'l Ass'n of Realtors, 590 F.2d 242, 245 (7th Cir. 1978) (stating that an order *approving* a proposed settlement can be reviewed after trial). One court, however, admitted, "In only one sense, of course, is the refusal to approve a proposed settlement final, for that *particular* settlement will never be revived." Seigal v. Merrick, 590 F.2d 35, 38 (2d Cir. 1978) (emphasis in original).

43. *See* Roach v. Churchman, 457 F.2d 1101, 1104-05 (8th Cir. 1972). *Cf.* United States v. American Inst. of Real Estate Appraisers of the Nat'l Ass'n of Realtors, 590 F.2d 242, 244-45 (7th Cir. 1978) (finding that an order *approving* a proposed settlement had neither the form nor effect of an injunction). In Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978), the court never addressed the issue of whether the denial of a settlement was a denial of an injunction.

44. 606 F.2d 420 (4th Cir. 1979).

45. *Id.* at 422.

46. *Id.* at 421. The *Carson* court's failure to examine the *Cohen* collateral order doctrine is especially surprising in light of the court's heavy reliance on Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978), a collateral order case. *See* 606 F.2d 423-24.

47. 606 F.2d at 423.

48. Irreparable harm is a key factor in determining whether an order is an

effect was found because "no right is forfeited as a result of delayed review. Here, injunctive relief was not finally denied; it was merely not granted at this stage in the proceedings."[49] The court analogized the denial of a consent decree to the denial of a motion for summary judgment asking for injunctive relief. Denial decided "only one thing—that the case should go to trial."[50] The court concluded by reviewing pragmatic reasons for not allowing appeals from consent decrees: the two-year delay already caused by the appeal, the potential for "an endless string of appeals," the difficult burden of demonstrating an abuse of discretion by the trial court, the potential for a district court to reconsider its initial refusal, and the enhanced ability of the district court to supervise the litigation if all decrees are reviewed after final judgment.[51] Furthermore, the court implied that any harm from its refusal to approve consent decrees would be minimized because it could review all proposed consent decrees after final judgment.[52]

The *Carson* court largely ignored a potentially dispositive approach to the issue of appealability[53]—the *Cohen* doctrine.[54] The district court's refusal to approve the title VII consent decree may have been reviewable as a "collateral order."[55] Since the Ninth Circuit has applied the "collateral order" doctrine to

injunction. *See* text accompanying notes 14, 28 *supra*; notes 68-79 *infra* and accompanying text.

49. 606 F.2d at 423.

50. *Id.* (quoting Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc., 385 U.S. 23, 25 (1966)).

51. 606 F.2d at 424-25. In addition to these specific factors, the court noted that appeals of right from interlocutory trial court decisions are generally disfavored because "[t]hey disrupt the trial process, slow the course of litigation and create unnecessary multiple appeals. A single appeal following final judgment facilitates orderly litigation and comprehensive appellate review of all issues presented . . . ." *Id.* at 422. Later, the court added that nonappealability enhances the district court's control over the litigation. *Id.* at 423.

52. *See id.* at 424-25.

53. Although the court mentioned the "collateral order" doctrine, it did not discuss the doctrine. This omission might be due to the failure of the parties to brief the appealability issue. They all assumed appealability, leaving the question whether the district court judge had abused his discretion as the only issue. *See* Brief for Appellants, Carson v. American Brands, Inc., 606 F.2d 420 (4th Cir. 1979); Joint Brief for Defendants-Appellees; Reply Brief for Appellants.

54. *See* notes 18-22 *supra* and accompanying text.

55. A persuasive argument can be made that the order was appealable under the "collateral order" doctrine. The first *Cohen* requirement, that the order not be tentative, informal, or incomplete, was clearly met. This *Cohen* element is satisfied if "no further consideration is contemplated." C. WRIGHT, A. MILLER & E. COOPER, *supra* note 10, § 3911, at 470. *See also* Case Comment, *supra* note 20, at 451. The district court issued an opinion stating the reasons for denial of approval. 446 F. Supp. 780 (E.D. Va. 1977), *appeal dismissed*, 606 F.2d 420 (4th Cir. 1979). The probability that the judge would reconsider his decision was sufficiently small to render the opinion a final order.

refusals to enter proposed settlements,[56] the Fourth Circuit should have at least acknowledged the possible applicability of the doctrine.

In addition to omitting any consideration of the *Cohen* doctrine, the court also failed to satisfactorily discuss section 1292(a)(1). The applicability of the "injunction" exception to the denial of title VII consent decrees requires reexamination of the case in light of the differences between title VII consent decrees and shareholder derivative settlements. The three most important factors governing the applicability of section 1292(a)(1) are: (1) whether the order has the substantial effect of an injunction; (2) whether irreparable harm would result; and (3) the effect of applying the competing policy considera-

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The second requirement, that the order be sufficiently separable from, but collateral to, the merits, is the crux of the *Cohen* appealability standard. In National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977), the Supreme Court held that a state court's refusal to stay an injunction was a final judgment, "since it involved a right 'separable from, and collateral' to the merits." *Id.* at 44 (quoting Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1949)). The injunction enjoined the petitioners from conducting a march. The Court explained that the refusal to stay the injunction "finally determined the merits of petitioners' claim that the outstanding injunction will deprive them of rights protected by the First Amendment during the period of appellate review." 432 U.S. at 44. In effect, the Court treated the petitioners' demand to be allowed to march pending appeal as separate from their ultimate right to conduct marches at any time. The *Carson* court's refusal to approve a settlement is even more collateral to the issues at trial because the major concern is whether the settlement would be fair and not whether anyone has legally violated title VII. *See* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 10, § 3911, at 470-71 ("so long as the matter is so collateral that it need not entail consideration of the merits, it may be reviewed immediately with no greater cost in appellate time than if review were postponed"). *See also* Cohen, *"Not Dead But Only Sleeping": The Rejection of the Death Knell Doctrine and the Survival of Class Actions Denied Certification*, 59 B.U. L. REV. 257, 265-66 (1979).

A finding of collaterality would also be consonant with the underlying finality justification of judicial efficiency. The optimal moment for judicial review of a refusal to approve a settlement is immediately after the refusal because one of the factors to be considered in assessing fairness is the *likely* outcome if the matter went to trial; post-trial review of abuse of discretion is likely to be heavily colored by the *actual* outcome at trial.

The third factor is whether the order would be essentially unreviewable after final judgment. The instant order is unreviewable not only because it will be rendered moot by any trial result, but also beause proposed settlements invariably contain a provision that nullifies the legal significance of the proposal upon its disapproval. *See* note 83 *infra* and accompanying text. Moreover, even assuming that review were possible, it would be difficult to frame the appropriate remedy since there is no longer any uncertainty as to the outcome at trial. *See* notes 85-86 *infra*; note 34 *supra* and accompanying text.

56. *See* notes 31-33 *supra* and accompanying text. *But cf.* notes 39-41 *supra* and accompanying text (discussing cases which have held that orders refusing to approve settlements are not collateral).

tions of finality and appealability.[57]

Clearly, the mere labeling of an order as an "injunction" will not render it appealable.[58] Instead, the initial determination is whether the order has the "substantial effect" of an injunction.[59] Critical to a "substantial effect" determination is whether the order restricts future conduct and does not compensate past harm.[60] This explains why refusals to approve shareholder derivative suit settlements have not been found to be "denials of injunctions."[61] The object of a shareholder derivative action is usually to ascertain the proper distribution of money or stocks, and the action rarely encompasses an injunction of future conduct. Similarly, many other types of class actions that seek only compensation fail to have the "substantial" effect of an injunction.[62] Title VII class actions, however, are clearly distinguishable. Pursuant to section 2000e-5(g),[63] three basic types of relief are available: "(1) Proscriptive—stopping the old unfair system or practices, (2) Corrective—creating a new system or set of practices that will be fair, and (3) Compensatory—adjusting for past wrongs."[64] Proscriptive,[65] correc-

57. *See* text accompanying notes 26-28 *supra*.

58. *See* note 24 *supra* and accompanying text. Curiously, all the parties, the dissent, and even the majority, refer to the proposed consent decree in *Carson* as an injunction. 606 F.2d at 423, 428-29 (Winter, J., dissenting).

59. *See* note 26 *supra* and accompanying text. Even though the court in Roach v. Churchman, 457 F.2d 1101 (8th Cir. 1972), noted the trial court's failure to "cast its order in the form of any injunction," *id.* at 1104, it is clear that the majority of circuits hold an order with the "substantial effect" of an injunction to be sufficient, irrespective of the label that the order is given. Note, *The Limits of Section 1292(A)(1) Redefined?: Appealability of the Class Determination as an Order "Refusing an Injunction,"* 9 U. TOL. L. REV. 488, 496, 500(1978) [hereinafter cited as Toledo Note]. *See also* Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188, 192 (1942); Boston Note, *supra* note 10, at 71.

60. *See* Boston Note, *supra* note 10, at 71.

61. *See generally* note 43 *supra* and accompanying text. The prospective nature of title VII consent decrees differs from a refusal to certify a class. *See, e.g.*, Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978). Certification of a class (or denial of such certification) does not compel future action or inaction.

62. For example, in Roach v. Churchman, 457 F.2d 1101 (8th Cir. 1972), in which section 1292(a)(1) was found inapplicable, the class sought wrongful death damages arising out of an airplane crash. Regulation of future conduct was not sought.

63. 42 U.S.C. § 2000e-5(g) (1976).

64. G. COOPER, H. RABB & H. RUBIN, FAIR EMPLOYMENT LITIGATION: TEXT AND MATERIALS FOR STUDENT AND PRACTITIONER 430 (1975). Most title VII consent decrees include a broad proscriptive order enjoining future illegal discrimination. Such a provision permits the court to hold in contempt a party who persists in a violation. Moreover, decrees can enjoin retaliatory action. *See* Note, *Title VII Consent Decrees: Affirmative Inaction?*, 18 SANTA CLARA L. REV. 517, 521 (1978).

65. Title VII consent decrees include proscriptive relief. *See* Note, *supra* note 64, at 521.

tive, and, in some cases,[66] compensatory relief all compel either future action or inaction and would thus have the substantial effect of an injunction.[67]

Since the requested relief in title VII consent decrees satisfies the definitional requirement of an injunction, the second element of section 1292(a)(1), the likelihood that irreparable harm would be caused by unappealability, must be examined.[68] Central to this consideration are the degree to which the appealed order affects or disposes of the merits and the extent to which the order would be reviewable after final judgment.[69] The meaning of the "affecting the merits" standard is somewhat uncertain,[70] but it apparently means that the appealed or-

66. If compensatory relief consisted only of reimbursement of back pay, it would not resemble an injunction. If an ongoing scheme is constructed to remedy past discrimination, however, such relief may have the substantial effect of an injunction.

67. *See* Boston Note, *supra* note 10, at 71. In Lewis v. Tobacco Workers' Int'l Union, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979), the Fourth Circuit held that a district court order requiring the defendant to comply with a number of plaintiffs' requests for relief was appealable. The circuit court stated that "the guidelines, requiring the defendants to act in some instances and forbidding them to act in others, [constitute] an injunction." 577 F.2d at 1139. The dissent in Carson aptly noted that "the proposed consent decree is equally appealable, because § 1292(a)(1) authorizes an appeal from an interloctory order 'refusing' an injunction." 606 F.2d at 429 (Winter, J., dissenting). Similarly, the Fifth Circuit has held injunctive provisions of a consent decree to be appealable pursuant to § 1292(a)(1). Myers v. Gilman Paper Corp., 544 F.2d 837, 847 (5th Cir. 1977).

68. In Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978), the Court stated that the exception was keyed to the "need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Id.* at 480 (quoting Baltimore Contractors v. Bodinger, 348 U.S. 176, 181 (1955)).

69. 437 U.S. at 480-81 & nn.6-7.

70. Arguably, an order either affects the merits or it does not affect the merits. If it does, it should be analyzed pursuant to section 1292(a)(1). If it does not, it is collateral and arguably appealable under section 1291. *See* note 55 *supra* and accompanying text. This dichotomy, however, is not dispositive. For example, in *Gardner*, a section 1292(a)(1) case, the Court said that an order denying class certification "did not affect the merits of petitioner's own claim." Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480-81 (1978). In *Coopers & Lybrand*, a collateral order case, the Court stated that an order denying class certification "generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" Coopers & Lybrand v. Livesay, 437 U.S. 463, 479 (1978) (quoting Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963)). Consequently, the same type of order was held nonappealable in both cases and was "enmeshed in the merits," yet did not affect the merits. Apparently, assuming that the Court is not blatantly inconsistent, an order can sufficiently involve the merits so that the *Cohen* collateral doctrine is not fulfilled, yet also be sufficiently separate from the merits so that § 1292(a)(1) is rendered inapplicable. This middle

der causes a party to lose a portion of the solution he seeks.

In examining the requirement of "affecting the merits," the *Carson* court compared the refusal to approve a title VII settlement to the denial of a motion for summary judgment,[71] which the Supreme Court has held to be nonappealable as a final order.[72] The Fourth Circuit considered the two to be analogous because the denial of either did not decide the merits, and the only thing decided was "that the case should go to trial."[73] Consent decrees and summary judgment, however, are distinguishable. The refusal to approve a proposed settlement is effectively a final decision[74] that the remedy chosen by the parties is unacceptable. The denial of a motion for summary judgment, however, is the court's decision on the necessity for trial without regard to the relief ultimately granted. The two may also be distinguished for reasons of judicial efficiency. Fear of floodgate appeals is an important consideration in the case of summary judgment motions because of the pervasive use of such motions. They are truly "pretrial orders" that are routinely requested. On the other hand, getting two adverse parties to agree to submit a consent decree is not a routine pretrial practice. Furthermore, since the vast majority of submitted consent decrees are approved and since it is common for courts to deny motions for summary judgment, the danger of burdening the courts is less with the former. Finally, the refusal to approve proposed title VII consent decrees is similar to the denial of a preliminary injunction. Although the language

ground dispells the theory of a rigid bifurcation. Instead of focusing on semantics, it is more important to probe the underlying justifications for requiring either "collateralness" or "affecting the merits."

For the most part, those shareholder derivative cases that considered nonappealable a refusal to approve a settlement concluded that the order affected the merits, *see, e.g.*, Seigal v. Merick, 590 F.2d 35, 37 (2d Cir. 1978), and those cases that considered the refusal to be appealable held that it was collateral, *see, e.g.*, Norman v. McKee, 431 F.2d 769, 773 (9th Cir.), *cert. denied*, 401 U.S. 912 (1970); Buchanan v. Century Fed. Sav. & Loan Ass'n, 393 A.2d 704, 707 (Pa. Super. Ct. 1978). One court, however, found the collateral order doctrine to be inapplicable despite the court's belief that the issuance of a consent decree was unrelated to the merits. *See* United States v. American Inst. of Real Estate Appraisers of the Nat'l Ass'n of Realtors , 590 F.2d 242, 245 (7th Cir. 1978) (order *approving* a proposed settlement held nonappealable). *See also* notes 38-39 *supra* and accompanying text.

71. 606 F.2d at 423.

72. Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc., 385 U.S. 23 (1966).

73. 606 F.2d at 423 (quoting Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc., 385 U.S. 23, 25 (1966)).

74. *See* notes 80-85 *infra* and accompanying text.

of section 1292(a)(1) refers to injunctions in general,[75] the legislative history of the provision suggests that the exception for injunctions was created primarily to permit appeal from denials of preliminary injunctions.[76] The harm that a plaintiff suffers when his request for a consent decree is denied would be similar to that suffered by a plaintiff whose request for a preliminary injunction is denied;[77] he may suffer a period of continuing discrimination and be harmed because of the *delay* in acquiring relief.[78] If the parties are forced to go to trial because of a denied settlement, the benefits that the consent decree would have conferred—for example, reassurance of a better job and enhanced job security[79]—would be lost, at least until final

75. The statute merely addresses the grant, continuation, modification, refusal, or dissolution of "injunctions." 28 U.S.C. § 1292(a)(1) (1976).

76. *See* Stewart-Warner Corp. v. Westinghouse Elec. Corp., 325 F.2d 822, 829-30 (2d Cir. 1963) (Friendly, J., dissenting), *cert. denied*, 376 U.S. 944 (1964); *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1072 (1965); Toledo Note, *supra* note 59, at 492-95. Of course, the statute is not necessarily restricted to preliminary injunctions even though a denial of immediate appeal from a preliminary injunction is more likely to result in irreparable harm. *Id.* at 519.

77. Regardless of whether the consent decree actually contains preliminary injunction wording, such wording is implicit. Title VII consent decrees call for an immediate end to ongoing discrimination. Moreover, under the "advance denial" theory, an order refusing a permanent injunction may amount to an "advance denial" of a preliminary injunction motion. If the court decides that no injunctive relief should be granted, since the "greater includes the less," no preliminary relief will be granted. *See* Toledo Note, *supra* note 59, at 494-95, and cases cited therein. The instant case highlights such an "advance denial." The district court rejected the proposed consent decree on the premise that any preferential treatment on the basis of race transgresses both title VII and the Constitution. Carson v. American Brands, Inc., 446 F. Supp. 780, 778 (E.D. Va. 1977), *appeal dismissed*, 606 F.2d 420 (4th Cir. 1979). Clearly no preliminary relief would have been forthcoming. This "advance denial" argument would only be applicable to similar denials of relief as a matter of law.

78. *See* Boston Note, *supra* note 10, at 71; Toledo Note, *supra* note 59, at 494, 518.

79. Professor Richards suggests that psychological injury, whether humiliation and embarrassment or more serious harm, is arguably "irreparable harm." Richards, *Preliminary Relief in Employment Discrimination Cases*, 66 KY. L.J. 39, 48 (1977). Professor Richards suggests three reasons why plaintiffs seek preliminary relief:

> First, such relief will frequently accord more complete relief than will final relief. Depending upon the circumstances, preliminary relief may prevent loss of income during the period of litigation; lessen or avert the humiliation and mental distress which may result from discrimination; reduce or eliminate problems of proving injuries and losses; provide an opportunity for the employee to gain experience and to establish his or her competence; and avoid the intrapersonal conflicts which may result from a displacement-type remedy. Second, an application for preliminary relief may result in the prompt determination of a crucial issue in the case . . . . Third, the granting of preliminary relief, both because of the reasons mentioned and the effect on the em-

judgment. Thus, a title VII consent decree is unlike a summary judgment motion and the decree "affects the merits" as much as any injunction does.

The other important consideration when assessing the irreparable harm factor is whether the order would be effectively reviewable after final judgment. Although some courts maintain that a refusal to enter a consent decree is reviewable after final judgment,[80] that assertion is easily challenged. In determining whether to approve a consent decree, the major consideration is whether the settlement is fair to all parties.[81] A trial determination of liability renders the fairness of the proposed settlement moot. Moreover, a proposed settlement will regularly contain a stipulation that if the settlement is not approved by the court or is for any other reason not consummated, the compromise and all releases thereunder shall be void.[82] The parties would thus have no legal ground to challenge the refusal to approve the consent decree. Even assuming that the order could be reviewed upon final judgment, it is improbable that it would be reviewed. Even courts holding that refusals to approve proposed settlements are unappealable contend that, as a practical matter, the propriety of the proposed settlement will not be raised again.[83] The requirement of unreviewability "does not require that the trial court be without power to reverse its ruling; it only requires that no further consideration be likely."[84] Finally, there are several practical limitations on the ability of an appellate court to review, after the final judgment, the trial judge's discretionary refusal to approve settle-

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ployer's operations, will frequently enhance the employee's settlement posture.

Id. at 40. A fourth reason, ensuring appealability in the event of the court's refusal to approve a consent decree, may now be added.

80. *See* Carson v. American Brands, Inc., 606 F.2d at 424-25; Roach v. Churchman, 457 F.2d 1101, 1104 (8th Cir. 1972). *Cf.* United States v. American Inst. of Real Estate Appraisers of the Nat'l Ass'n of Realtors, 590 F.2d 242, 245 (7th Cir. 1978) (holding that an order *approving* a consent decree is "subject to effective review both before and after entry of final judgment") (emphasis added).

81. *See* Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977); Young v. Katz, 447 F.2d 431, 433 (5th Cir. 1971).

82. *See* Haudek, *The Settlement and Dismissal of Stockholders' Actions—Part II: The Settlement*, 23 Sw. L.J. 765, 783 (1969). In fact, neither the compromise nor anything said in the settlement proceedings may be invoked as admissions against interest. *Id.*

83. Seigal v. Merrick, 590 F.2d 35, 38 (2d Cir. 1978). *See also* Carson v. American Brands, Inc., 606 F.2d at 429 (Winter, J., dissenting).

84. *In re* General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1108 (7th Cir.) (citing 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 10, § 3911, at 470), *cert. denied*, 100 S. Ct. 146 (1979).

ments. An adjudication at the trial level eliminates the uncertainty present at the time of a settlement and makes it difficult to evaluate the fairness of the proposed settlement.[85] Another problem could arise if the parties reach an agreement that is rejected by the trial judge and then tender several other proposals that are all rejected. If the appellate court reverses the trial judge on all the decrees[86]—an issue arises over which decree, if any, is to be chosen. Although the first decree should arguably be given effect, it is far from clear whether that would be the result. Conceivably, either all the decrees could be remanded to have the district court choose among them, or the appellate could make the choice. If the latter is done, the appellate court would arguably be interjecting itself unnecessarily into the trial process. It would no longer be merely reviewing decrees, but would be affirmatively choosing the "preferred" alternative.

The third element in ascertaining the applicability of section 1292(a)(1) is the effect of the competing policy justifications for the existence of a finality rule and for the creation of an exception.[87] The *Carson* court enumerated several policy reasons to limit review: the added judicial efficiency that can be obtained by the avoidance of piecemeal appeals and concomitant trial delays, the increased precision of appellate review after complete development of the facts at trial, and the enhancement of the district court's control over the litigation.[88] Many of these policy considerations are largely inapplicable to a refusal to approve a proposed settlement. Although appellate judicial resources will be conserved if no further appeal of the denial of the consent decree takes place, refusals to review denials of consent decrees mean continued use of judicial resources at the district court level.[89] The savings at the district

85. *See* note 34 *supra* and accompanying text.

86, The dissent believed this to be the case in *Carson. See* 606 F.2d at 428-29.

87. These policy reasons are similar to those used in the pragmatic *Gillespie* balancing test. *See* note 16 *supra.* Although the *Gillespie* test no longer has vitality as an independent exception to be applied in individual cases, the policy considerations of *Gillespie* could still be applied, not to a particular case, but to a general type of order. *See* Boston Note, *supra* note 10, at 72 n.65.

88. 606 F.2d at 424-25. *See also* note 12 *supra.* This rationale is inapplicable, because the harassing party must first agree to a complete settlement, with a strong probability that it will be approved, before instigating the "harassing" appeal of the denial.

89. In addition, further litigation may eventually waste appellate resources by generating additional appealable issues that would have been avoided if the earlier settlement had resulted in a consent decree. *See* note 15 *supra* and accompanying text. *See also* Boston Note, *supra* note 10, at 75.

court level may well offset the costs at the appeals level. An additional reason to delay review—the likelihood that a more well-developed record will be available for review by an appellate court after a trial—is irrelevant here because appellate review of the judge's discretionary denial must be based on the probable outcome of the litigation at the time of settlement, and an actual trial outcome only distorts a retroactive assessment of the circumstances as they appeared at that time.[90] The *Carson* court was correct in pointing out that denial of appeal would enhance the trial court's control over the litigation,[91] but the argument that such control is desirable assumes the availability of effective review to correct any trial court abuses. It has already been demonstrated that effective review will be unavailable.[92] The Fourth Circuit, in *Flinn v. FMC Corp.*,[93] has established careful standards for approval of title VII settlements.[94] Despite the *Carson* majority's belief that the *Flinn* standards should have been followed,[95] the *Carson* finding of unappealability means that the use of these standards will be effectively reviewable only when the lower court approves the proposed settlement.

Supplementing these policy reasons favoring appealability is the general policy of encouraging settlements.[96] Class action settlements should be encouraged to an even greater extent,[97] and the legislative history of title VII indicates that proposed title VII consent decrees should be accorded the greatest deference.[98] According to the Supreme Court, "[c]ooperation and

90. *See* note 34 *supra* and accompanying text.

91. *See* 606 F.2d at 423.

92. *See* notes 80-85 *supra* and accompanying text.

93. 528 F.2d 1169, 1172-74 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

94. 528 F.2d at 1172-74.

95. *See* 606 F.2d at 422.

96. Settlements are generally favored. *See* Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977); Rodgers v. United States Steel Corp., 541 F.2d 365, 372 (3d Cir. 1976); Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976); Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767, 771 (2d Cir. 1975); Massachusetts Casualty Ins. Co. v. Forman, 469 F.2d 259, 261 (5th Cir. 1972); Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 469 F. Supp. 836, 846 (N.D. Ill. 1979).

97. *See* Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977); Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976).

98. A court recognizing this policy stated: "It is often said that litigants should be encouraged to determine their respective rights between themselves . . . . Particularly in class action suits, there is an overriding public interest in favor of settlement . . . . In a Title VII case, as here, the policy favoring settlement is even stronger in view of the emphasis placed upon voluntary conciliation by the Act itself." Cotton v. Hinton, 559 F.2d 1326, 1330-31 (5th Cir. 1977). *See generally* Note, *supra* note 64, at 517-18. *See also* Rodgers v. United States

voluntary compliance were selected as the preferred means for achieving [the goals of title VII]."[99] Clearly, "[l]itigation was to be the last resort."[100] This policy is a strong argument in favor of immediate appealability when a trial court has disapproved consent decrees that would eliminate the need for a trial.

On balance, the *Carson* decision that refusals to approve proposed title VII consent decrees are not appealable appears ill considered. The majority's recognition of the injunctive nature of the requested relief[101] juxtaposed with the court's conclusion that section 1292(a)(1) is inapplicable is perhaps the most inexplicable aspect of the opinion. The court, in considering whether the denial of the consent decree was appealable under section 1292(a)(1), failed to understand the unique characteristics of title VII consent decrees. The prospective relief inherent in title VII consent decrees not only has the substantial effect of an injunction but also results in the requisite irreparable harm. Irreparable harm results because of the delay in obtaining relief and because the order is effectively unreviewable after final judgment. Furthermore, the usual policy supporting finality—judicial efficiency—is much less persuasive in the unique context of title VII consent decrees. The *Carson* court also failed to give proper weight to the strong legislative policy favoring title VII settlements. In the future, therefore, courts should recognize the unique nature of title VII consent decrees and allow appeal from district court refusals to approve title VII consent decrees.

Steel Corp., 541 F.2d 365, 372 (3d Cir. 1976); Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 n.11 (9th Cir. 1976); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 846 (5th Cir. 1975); Patterson v. Newspaper & Mail Delivers' Union, 514 F.2d 767, 771 (2d Cir. 1975).

99. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

100. Note, *Jurisdiction of the Federal Courts Under Title VII to Issue Interim Injunctive Relief*, 13 GONZ. L. REV. 995, 1008 (1978).

101. *See* 606 F.2d at 423 ("Here, injunctive relief was not finally denied; it was merely not granted at this stage in the proceedings."); *id.* at 425 ("The district court [decided] to send the parties to trial, in lieu of granting immediate injunctive relief . . . ."). *See also id.* at 429 n.1 (Winter, J., dissenting).